07-0583-cv

To Be Argued By:
ERIC SEILER

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT MORRISON, individually and on behalf of all others similarly situated, RUSSELL LESLIE OWEN, BRIAN SILVERLOCK, and GERALDINE SILVERLOCK,

Plaintiffs-Appellants,

—and—

MARIA KENNEDY, HARVARD B. KOLM and NORMAN HAUGE,

Plaintiffs,

—against—

NATIONAL AUSTRALIA BANK LTD., HOMESIDE LENDING INC., FRANK CICUTTO, HUGH HARRIS, KEVIN RACE and W. BLAKE WILSON,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE HOMESIDE LENDING INC.

ERIC SEILER
FRIEDMAN KAPLAN SEILER
& ADELMAN LLP
1633 Broadway
New York, New York 10019-6708
(212) 833-1100

Attorneys for Defendant-Appellee Washington Mutual Bank, S.A., as successor in interest to HomeSide Lending, Inc.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), defendant-appellee Washington Mutual Bank, F.A., ("Washington Mutual Bank"), as successor in interest to HomeSide Lending, Inc. ("HomeSide"), sued herein as HomeSide Lending, Inc., states that prior to Washington Mutual Bank's purchase of HomeSide on March 1, 2002, HomeSide's parent corporation was HomeSide International, Inc., whose parent corporation, in turn, was National Australia Bank Limited, a publicly-held company. HomeSide further states that Washington Mutual Bank's parent corporation is New American Capital, Inc., whose parent corporation is Washington Mutual Inc., a publicly held company. Capital Research and Management Company, a registered investment advisor, has reported in SEC filings that as of the end of 2006 it was the legal and registered owner of more than 10% of Washington Mutual, Inc. stock, though it disclaims beneficial ownership of the shares.

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PRELIMINARY STATEMENT

Defendant-Appellee Washington Mutual Bank, F.A., the successor to HomeSide Lending, Inc.[1], seeks affirmance of the District Court's dismissal of this action for want of federal subject matter jurisdiction. The Australian plaintiffs' damage claims for alleged losses to the value of their ordinary shares purchased on the Australian Stock Exchange in alleged reliance on claimed misrepresentations made in National Australia Bank's ("NAB") (HomeSide's Australian parent) securities disclosures do not state a Section 10(b) claim within the jurisdictional reach of the federal courts.

In the complaint, and in the proceedings below, the foreign plaintiffs made little effort to distinguish their claims against HomeSide from their claims against NAB. On appeal, apparently recognizing the futility of their effort to avoid the extraterritorial limitations on the reach of Section 10(b), the foreign plaintiffs attempt to advance theories against HomeSide that they claim can survive even if the dismissal of NAB on

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[1] Plaintiffs name HomeSide Lending, Inc. as one of the defendants in this action. HomeSide Lending, Inc. no longer exists as such. The actual party appearing herein is Washington Mutual Bank, F.A., as successor in interest to HomeSide Lending, Inc. For ease of reference throughout this memorandum, the defendant is referred to as "HomeSide."

jurisdictional grounds is affirmed. The foreign plaintiffs' efforts to recraft their claims on appeal, however, have no effect upon the jurisdictional analysis. The dispositive question remains whether the domestic conduct alleged in the complaint "directly caused" the harm of which the foreign plaintiffs complain. And the answer to that question remains no, for the reasons set forth in NAB's brief. Accordingly, the jurisdictional defects that the District Court relied on to dismiss the action apply to all the foreign plaintiffs' legal theories against all defendants, and the dismissal on subject matter jurisdictional grounds should be affirmed. To avoid needless duplication, HomeSide therefore incorporates all of NAB's jurisdictional arguments by reference.

Moreover, even if the claims against HomeSide were to be considered separately, affirmance is still required. The Section 10(b) claims cannot properly be viewed as primary claims against HomeSide. At most, the provision of information by a subsidiary to a corporate parent that underlies an alleged misrepresentation by the parent, constitutes aiding and abetting, not *primary* conduct. Under *Central Bank* and its progeny, there is no Section 10(b) liability for such conduct. Similarly, the foreign plaintiffs newly minted effort to focus on *scheme* liability under Rules 10b-5(a) and 10b-5(c) does not alter the legal result from that applicable to

misrepresentation liability under Rule 10b-5(b). The foreign plaintiffs alleged injury stems from reliance on the alleged misrepresentation, not from any alleged direct impact from the transactions that they claim were mis-described. Accordingly, the scheme liability caselaw is not applicable and, in all events, cannot be used as an end run around *Central Bank*.

Finally, HomeSide argued below that the Complaint fails to satisfy Rule 9 and the Private Securities Litigation Reform Act of 1995 (the "PSLRA", 15 U.S.C. § 78u-4 *et seq*.), and to adequately allege scienter. The District Court did not address these pleading defects, granting defendants' motion on other grounds. Should the Court reverse the decision below, remand for consideration of these pleading defects would be appropriate for two reasons: (1) the complaint fails to allege with the required particularity that any of the statements attributed to HomeSide were false or misleading when they were made; and (2) the complaint's allegations concerning scienter are deficient, especially in light of the Supreme Court's recent decision in *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 127 S. Ct. ____ (2007).

ISSUE PRESENTED

Did the District Court properly dismiss the foreign plaintiffs' Section 10(b) claims against HomeSide?

STATEMENT OF THE CASE

HomeSide incorporates the "Statement of the Facts" contained in the brief of co-appellee NAB, as though fully set forth herein. In the proceedings below, defendants successfully moved to dismiss the complaint, for want of subject matter jurisdiction. With respect to the claims against HomeSide, specifically, The Court held:

> HomeSide's alleged conduct – however it may be classified – is not in itself *securities* fraud. It amounts to, at most, a link in the chain of an alleged overall securities fraud scheme that culminated abroad. Thus, while Plaintiffs urge that there would have been no securities fraud but-for the domestic conduct, they fail to appreciate that the domestic conduct would be immaterial to its Rule 10b-5 claim but-for (i) the allegedly knowing incorporation of HomeSide's false information; (ii) in public filings and statements made abroad; (iii) to investors abroad; (iv) who detrimentally relied on the information in purchasing securities abroad…. On balance, it is the foreign acts – not any domestic ones – that 'directly caused' the alleged harm here. No. 03 Civ. 6537, 2006 WL 3844465, at *8 (S.D.N.Y. Oct. 25, 2006).

SUMMARY OF ARGUMENT

Appellee HomeSide presents two separate arguments in this brief. *First*, the District Court properly determined that it lacked subject matter jurisdiction over the *transactions* about which the foreign plaintiffs complain. As purchasers of securities in an Australian company traded on

an Australian exchange, the foreign plaintiffs' claims lack the nexus to the United States required for the exercise of subject matter jurisdiction. Because jurisdictional analysis is transactional, dismissal is required with respect to the claims asserted against both the foreign defendant and the domestic defendants, including HomeSide.

Second, HomeSide cannot be deemed a primary violator of Rule 10b-5. The District Court correctly determined that HomeSide itself made no misrepresentations under Rule 10b-5(b). On appeal, Plaintiffs' improperly expand their argument to claim for the first time that HomeSide is subject to "scheme" liability pursuant to Rules 10b-5(a) and (c). This new argument was not raised in response to the motion to dismiss, was thereby waived, and should not be considered on appeal. Even were this Court to consider plaintiffs' newly minted scheme liability theory, it must be rejected as an inappropriate end run around the *Central Bank* prohibition to aiding and abetting liability for alleged fraudulent misstatements.

ARGUMENT

I.

THE DISTRICT COURT PROPERLY HELD THAT IT LACKED SUBJECT MATTER JURISDICTION OVER THE FOREIGN PLAINTIFFS' CLAIMS AGAINST HOMESIDE

The foreign plaintiffs' claims in this case concern securities issued by NAB, a foreign company, which are held almost entirely by foreign residents. HomeSide, which was based in the United States, had no publicly issued securities. As set forth in NAB's brief, plaintiffs' alleged losses were not caused by any conduct in the United States, but by NAB's alleged misstatements in Australia to foreign investors. Accordingly, HomeSide adopts, as if set forth herein, the arguments advanced by NAB that there is no subject matter jurisdiction over the claims asserted by these foreign plaintiffs.[2]

On appeal, the foreign plaintiffs make an argument that they did not make below: they contend that they may proceed against HomeSide, even if the District Court properly dismissed their claims against NAB. They appear to argue that this Court's conduct test for subject matter

[2] HomeSide also adopts, as if set forth herein, the arguments advanced by Defendants-Appellees Hugh Harris, Kevin Race, and W. Blake Wilson.

jurisdiction under the securities laws somehow does not apply, or somehow applies differently, to the American-based defendants.

The foreign plaintiffs cite no authority for this position, and in fact, the law is to the contrary. The presumption against extraterritorial application of United States law applies even if the defendant is American, and some of the underlying conduct occurs in the United States. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*, 127 S. Ct. 1746, 1753, 1758-59 (2007) (holding that patent claim of American plaintiff against American defendant must be dismissed). In particular, the conduct test that this Court set forth in *Bersch v. Drexel Firestone, Inc.,* 519 F.2d 974 (2d Cir. 1975), analyzes subject matter jurisdiction on a transactional, not a defendant by defendant basis. This Court held:

> [T]he anti-fraud provisions of the federal securities laws … [d]o not apply to losses from sales of securities to foreigners outside the United States unless acts (or culpable failures to act) within the United States directly caused such losses.

Id. at 993. This controlling test applies equally to foreign and domestic defendants, and contains no suggestion that it can be dispensed with if claims of a domestic defendant are being considered. The test makes clear that "[t]he issue is whether the court has jurisdiction over the particular acts committed by each defendant in connection with the transaction." *Cromer*

Finance Ltd. v. Berger, No. 00 Civ. 2284, 2003 WL 21436164, at *4 (S.D.N.Y. July 13, 2005); *see CL-Alexanders Laing & Cruickshank v. Goldfield*, 709 F. Supp. 472, 478 (S.D.N.Y. 1989) (subject matter jurisdiction not considered on defendant-by-defendant basis where complaint alleges that defendants conspired and aided and abetted to commit securities fraud).

In *Bersch* itself, for example, the plaintiffs sued a slew of domestic defendants—American underwriters, lawyers, and accountants—in addition to foreign parties. *Bersch*, 519 F.2d at 985 & n.24. This Court directed that the district dismiss all of the claims of all of the foreign purchasers against all of the defendants, including the domestic defendants. *Id*. at 997 ("We therefore direct that the district court eliminate from the class action all purchasers other than persons who were residents or citizens of the United States.") Likewise, the foreign plaintiffs in *Zoelsch v. Arthur Andersen & Co.*, 824 F.2d 27, 29 (D.C. Cir. 1987), a case applying *Bersch*, tried to establish subject matter jurisdiction by suing *only* against an American defendant. Like the foreign plaintiffs in the case at bar, the foreign plaintiffs in *Zoelsch* alleged that the American defendant "provided false and misleading information" to a foreign entity, which then provided the information to foreign investors who then suffered harm. *Id.* The

District of Columbia Circuit held that the direct causation test of *Bersch* was not met, and affirmed the dismissal of this claim. *Id.* at 34-35 ("it is clear that any actual defrauding of investors took place in West Germany," "that reliance and damages would have occurred there," and that the American defendant's conduct was "'merely preparatory' to any fraud perpetrated on West German investors, and did not 'directly cause' their losses"; quoting *Bersch*, 519 F.2d at 992-93).

In short, courts applying the conduct test have consistently applied it without regard to the citizenship or location of the defendants, and when they have found that a transaction is beyond the territorial scope of the securities laws, they have entered dismissals against all defendants—not just the foreign ones. *Butte Mining PLC v. Smith*, 76 F.3d 287, 289, 291 (9th Cir. 1996) (affirming dismissal, on subject matter jurisdiction grounds, of claims against Montana defendants as well as English defendants, because "the alleged fraud … was a transaction wholly outside the scope of our securities laws, involving alien sellers, an alien purchaser, and shares of stock in two United Kingdom companies"); *MCG, Inc. v. Great W. Energy Corp.*, 896 F.2d 170, 172, 175-76 (5th Cir. 1990) (affirming dismissal, on subject matter jurisdiction grounds, of claims against Texas and California companies and their officers); *In re Bayer AG Sec. Litig.*, 423 F. Supp. 2d 105, 107, 111-14

(S.D.N.Y. 2005) (subject matter jurisdiction dismissal under conduct test of claims against foreign company's American subsidiary); *Froese v. Staff*, No. 02 Civ. 5744 (RO), 2003 WL 21523979, at *1-2 (S.D.N.Y. July 7, 2003) (conduct test dismissal of claims against foreign company's American subsidiary and CEO and CFO of American subsidiary); *In re Baan Co. Sec. Litig.*, 103 F. Supp. 2d 1, 5-6, 9-11 (D.D.C. 2000) (subject matter jurisdiction dismissal of claims against American officer of American operations of foreign company); *McNamara v. Bre-X Minerals Ltd.*, 32 F. Supp. 2d 920, 922, 924-25 (E.D. Tex. 1999) (subject matter jurisdiction dismissal of claims against American investment banks); *Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v. Salomon Bros. Int'l Ltd.*, 928 F. Supp. 398, 399-400, 403 (S.D.N.Y. 1996) (dismissing claims against Salomon Brothers Inc. and Salomon Brothers Holding Company, both Delaware companies based in New York).

Here, as in *Bersch*, the foreign plaintiffs' alleged losses were suffered abroad and were based upon the dissemination of information by a foreign defendant, and for the reasons set forth in NAB's brief, the foreign plaintiffs' claims must be dismissed as against all of the defendants. The foreign plaintiffs' attempt to recharacterize their claims against the American defendants as "primary" or "scheme" claims simply does not

affect the analysis, moreover, because it does not change the mechanism of causation that they have alleged: HomeSide's activities were at most preliminary and ancillary to the alleged dissemination of information by the foreign defendant and they should not be viewed separately for jurisdictional purposes. Accordingly, given that the starting premise of the foreign plaintiffs' effort to separately analyze their Section 10(b) claim on a defendant-by-defendant basis is flawed, even if the foreign plaintiffs were otherwise able to state a Section 10(b) claim against HomeSide, their claims should be rejected.

II.

HOMESIDE IS NOT A PRIMARY VIOLATOR OF SECTION 10(B)

A. HomeSide Is Not Liable For Violations of Rule 10b-5(b)

The District Court properly dismissed the Section 10(b) claim against HomeSide because HomeSide is not a primary violator of the securities laws. The complaint does not allege that HomeSide made any actionable misstatements to plaintiffs or that any actionable omissions are directly charged to HomeSide. In their brief on appeal, plaintiffs point to a statement in the *American Banker* attributed to HomeSide's COO Kevin Race, where he articulated an expectation that HomeSide would be relatively insulated in a downturn because it had relatively lower fixed costs than other

businesses in its industry.[3] Whether accurate or not, this statement has nothing to do with the misrepresentation of the value of HomeSide's loan portfolio which forms the basis of plaintiffs' misrepresentation claim. As such, this excerpted journalist's interview cannot serve as an actionable misstatement or omission. Only NAB made financial disclosures. The District Court correctly held that HomeSide cannot be responsible for the alleged misstatements of its corporate parent. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994) (no private cause of action for aiding and abetting another party's purported securities law violations). *Central Bank* holds that primary liability exists only where the person or entity accused "employs a manipulative device or makes a material misstatement (or omission) on which a purchaser or seller of securities relies … assuming *all* of the requirements for primary liability under Rule 10b-5are met." *Id.* at 191 (emphasis in original).

For a defendant to incur primary liability under the federal securities laws, a misrepresentation must be attributed to the specific actor at the time of the dissemination. *Wright v. Ernst & Young LLP*, 152 F.3d 169, 175 (2d Cir. 1998). As explained by this Court, this "bright line" test gives

[3] Plaintiffs-Appellants Brief ("PB __") 10; Joint Appendix ("A __") 84-85.

effect to the Supreme Court's abolishment of aiding and abetting liability in *Central Bank*. Quoting its prior decision in *Shapiro v. Cantor*, 123 F.3d 717, 720 (2d Cir. 1997), the *Wright* Court explained: "[i]f *Central Bank* is to have any real meaning, a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b)." 152 F.3d at 175.

A corporate subsidiary cannot be held accountable for statements made by its parent, even when those statements concern the subsidiary's operations. *See Ravens v. Republic New York Corp.*, No. Civ.A. 99-4981, 2002 WL 1969651 (E.D. Pa. Apr. 24, 2002) (dismissing 10b-5 claims against corporate subsidiary even though underlying fraud occurred at the subsidiary level); *In re Sotheby's Holdings, Inc.*, No. 00 Civ. 1041 (DLC), 2000 WL 1234601, at *5-6 (S.D.N.Y. Aug. 31, 2000) (dismissing claims against operating company subsidiary where misstatements attributed to the parent holding company); *Lindblom v. Mobile Telecomms. Techs. Corp.*, 985 F. Supp. 161, 163 (D.D.C. 1997) ("A wholly owned corporate subsidiary of a corporate parent is not liable for the deceitful statements of its parent corporation."); *Ivers v. Keene Corp.*, 780 F. Supp. 185, 188 (S.D.N.Y. 1991) (dismissing 10b-5 claim against subsidiary because it "made no relevant statements to the investing public and had no publicly traded shares during the class period"); *cf. Copland v. Grumet*, 88

F. Supp. 2d 326, 330-34 (D.N.J. 1999) (dismissing claims against subsidiary's executives where the allegedly false statements were made by the parent company).

These courts recognize, implicitly or explicitly, what *Wright* made clear: that section 10(b) addresses disclosure, and thus that liability under Rule 10b-5 must be predicated on a statement actually made by, or attributed to, the defendants. What matters is not who allegedly engaged in conduct that rendered a later statement false (e.g., who misvalued securities held by the company), but rather who made the allegedly false statement.

In *Sotheby's*, for example, the court acknowledged that the parent company served primarily as a holding company of the defendant subsidiary. 2000 WL 1234601, at *1. Even so, the court refused to attribute the parent's statements about the operation of the business to the subsidiary. The allegation of the complaint identified the statements "as having been made by 'Sotheby's' – which is defined to include both the parent and the subsidiary – or by an individual who was an officer of both companies." *Id.* at *5. Because the complaint did not distinguish between the parent and the subsidiary, and did not expressly allege that the subsidiary was "the original and knowing source of any misleading statements" (*id.*), the court dismissed the claims against the subsidiary. *Id.* at *5-6. Similarly, in *Ravens*, the

underlying and allegedly undisclosed misconduct occurred at the subsidiary level. 2002 WL 1969651, at *11. The misrepresentation that formed the basis for the Rule 10b-5 claim, however, was the parent corporation's statement, in a publicly filed merger agreement, that there had been no events that could have a material adverse effect on the company. *Id.* at *3, *11. Because that statement was made by the parent company, and not by the subsidiary that had engaged in the alleged wrongdoing, the court dismissed the 10b-5 claim against the subsidiary. *Id.* at *11-12.

In contrast to these many decisions, plaintiffs suggest that HomeSide may be held liable for NAB's alleged misstatements based on *In re Kidder Peabody Sec. Litig.*, 10 F. Supp. 2d 398 (S.D.N.Y. 1998). Judge Jones, who not only granted defendants' motion, but also decided *Kidder*, did not agree. In *Kidder*, General Electric, the parent and a United States company, "did nothing more than collect [the domestic subsidiary's] information and transcribe it onto the page. Kidder controlled the content of the information. When GE opened its mouth regarding Kidder, Kidder's words came out." *Id.* at 407. As was recognized in *Copland v. Grumet*, 88 F. Supp. 2d 326, 333, "it is likely that the court's holding [in *Kidder*] has been called into question by *Wright*," which was decided one month after the *Kidder* decision was issued. After the Court's articulation of a bright-line

test in *Wright*, it is now clear that in order for a defendant to be liable for a false statement, it must make the allegedly false statement itself or be identified as the source of the statement at the time it is made. Merely being the underlying source of information contained in an alleged misstatement does not lead to liability. Thus, because the Complaint does not allege that NAB's statements were attributed to HomeSide at any time, let alone when they were made, HomeSide cannot be liable for NAB's statements.

Similarly, in *In re LaBranche Sec. Litig.*, 405 F. Supp. 2d 333 (S.D.N.Y. 2005), before concluding that the parent's alleged misstatements could be attributed to the subsidiary, the court found a near identity between the parent and the subsidiary with significant overlap between the officers and directors of the parent and the subsidiary. No such facts are alleged in this case.

In any event, *LaBranche*, like the third case that plaintiffs rely on, *Menkes v. Stolt-Nielsen S.A.*, No. 03 CV 409, 2006 WL 1699603 (D. Conn. June 19, 2006), was based on the abandonment of this Court's bright-line rule in *Wright*, and the tenuous extension of the decision in *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63 (2d Cir. 2001). In *Scholastic*, the Court held that a corporate insider could be held liable for the misstatements attributed to the corporation. The allegations in *Scholastic*, however, made

clear that the insider was making fraudulent statements directly to the public. The corporate insider in *Scholastic* was responsible for the corporation's communications with investors and industry analysts, had access to internal corporate documents and reporting, attended management and committee meetings, as well as held conversations with other officers and employees, and participated in the preparation of director's books analyzing the data and commented on the sales trends about which the misstatements were made. *Id.* at 75-76. *Scholastic*'s holding surely does not apply to HomeSide, which shares none of the characteristics of the company's vice president of finance and investor relations in that case. HomeSide, a subsidiary, half a world away from NAB, was not the corporate insider of the *Scholastic* case, and neither *Scholastic* nor the cases that rely on it provide a basis for treating HomeSide as a primary violator.

B. HomeSide Is Not Liable for Violations of Rules 10b-5(a) and (c)

1. Plaintiffs Waived Their Scheme Liability Claims

Plaintiffs raise on this appeal an argument not raised on the motion below: that HomeSide may be held liable under a theory of "scheme" liability pursuant to Rules 10b-5(a) and (c), even if there is no liability pursuant to Rule 10b-5(b). Because plaintiffs' scheme liability argument was not raised in opposition to defendants' motion to dismiss

below, it is deemed waived and is not properly before the Court on this appeal. "The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, … waiver will bar raising the issue on appeal." Wal-Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 124 n. 29 (2d Cir. 2005) (quoting United States v. Braunig, 553 F.2d 777, 780 (2d Cir. 1977)).

2. Plaintiffs' Scheme Liability Theory Is A Backdoor Attempt to Allege Aiding and Abetting Claims

Even if plaintiffs' theory of scheme liability were properly raised on this appeal, plaintiffs still could not prevail. The law is clear that plaintiffs may not salvage their aiding and abetting claims by recasting them as claims of scheme liability. Thus, plaintiffs' 10b-5(a) and (c) claims fail for the same reason as their 10b-5(b) claim: 10(b) does not provide a cause of action for aiding and abetting. Any alleged scheme to defraud or manipulate the price of NAB's securities could be accomplished only through NAB's communication of the allegedly incorrect information concerning HomeSide.

As was recently articulated in *Kemp v. Universal Am. Fin. Corp.*, after *Central Bank*, the "act, practice or course of business" in a 10b-5(c) claim cannot rest on allegations of material misstatements and omissions made by other defendants. No. 05 Civ. 9883, 2007 WL 86942,

*17 (S.D.N.Y. Jan. 10, 2007). The *Kemp* court dismissed a 10b-5(c) claim against a defendant based on insufficient allegations against that defendant for market manipulation where "the remainder of the Complaint concerns the other Defendants' misstatements of fact or omissions, making [the count against this particular defendant] look like a 10b-5(b) aiding and abetting claim dressed up as a 10b-5(c) claim." *Kemp*, 2007 WL 86942, at *17; *see also Schnall v. Annuity & Life Re, Ltd.*, No. 02 Civ. 2133, 2006 WL 2331138, *6 (D. Conn. Aug. 10, 2006) (subsections (a) and (c) of Rule 10b-5 do not create a "short cut" to circumvent *Central Bank's* limitations on liability for a secondary actor's involvement in preparing misleading documents); *In re Marsh & McLennan Cos., Inc. Sec. Litig.*, No. 04 Civ. 8144, 2006 WL 2057194, *32 (S.D.N.Y. July 20, 2006) (allegations that defendants made or allowed to be made false or misleading statements are insufficient to state a claim for scheme liability).

The Court has made clear that, "where the sole basis for … claims [of market manipulation] is alleged misrepresentations or omissions, plaintiffs have not made out a market manipulation claim under Rule 10b-

5(a) and (c)." *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 177 (2d Cir. 2005).[4]

Plaintiffs' citation of *In re Global Crossing Ltd. Sec. Litig.*, 322 F. Supp. 2d 319 (S.D.N.Y. 2004), and *In re Parmalat Sec. Litig.*, 383 F. Supp. 2d 616 (S.D.N.Y. 2005), attempts to obscure this point through reliance on cases where the defendant engaged in actual transactions that manipulated the market. In *Parmalat*, Judge Kaplan held that 10b-5(a) and (c) claims could proceed against a lawyer on the basis of two *transactions* involving shell companies created and controlled by that lawyer. *Parmalat*,

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[4] Section 10(b) expressly requires either deceptive or manipulative conduct, and Rule 10b-5 can be no broader in application than the governing statute that authorized that rule. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 214 (1976) ("[D]espite the broad view of the Rule advanced by the Commission in this case, its scope cannot exceed the power granted the Commission by Congress under s 10(b).") Section 10(b) "prohibits only the making of a material misstatement (or omission) or the commission of a manipulative act" in connection with the purchase or sale of a security. *Central Bank*, 511 U.S. at 177. Rules 10b-5(a) and (c) impose liability for employment of any "scheme or artifice to defraud or fraudulent act or course of business." A device or contrivance is not "deceptive," within the meaning of § 10(b), absent some misstatement or a failure to disclose by one who has a duty to disclose. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474-75 (1997). Moreover, the term "manipulative" in § 10(b) "is virtually a term of art when used in connection with securities markets" (*id.* at 476, quoting *Ernst*, 425 U.S. at 199) and has the limited contextual meaning ascribed in *Santa Fe*: "[manipulation] refers generally to practices, such as wash sales, matched orders, or rigged prices, that … mislead investors by artificially affecting market activity" (*id.* at 476).

383 F. Supp. 2d at 625. In the first transaction, the sale of assets to one of the shell companies "was a fiction designed to allow Parmalat to book as receivables obligations that it knew would not be paid." *Id.* In the second transaction, Parmalat's loan to a shell company was actually payment to another individual, and not a loan at all. *Id.* Similarly, in *Global Crossing*, Judge Lynch held that scheme liability claims against the company's outside auditor could proceed because the auditor developed and oversaw an accounting system for sham transactions. 322 F. Supp. 2d at 326.

The *transactions* in *Parmalat* and *Global Crossing* are wholly unlike the mere *misstatements* alleged in this case. Rather than having allegedly engaged in transactions to manipulate the price of securities, HomeSide is alleged to have misvalued the prepayment rates of certain loans, resulting in the inflation of asset values included in NAB's financials. HomeSide, then, did not engage in the type of conduct for which courts have found 10b-5(a) and (c) liability.

Thus, as plaintiffs do not allege that HomeSide made or affirmatively caused to be made a fraudulent misstatement or omission, nor has HomeSide engaged in manipulative securities trading practices that directly injured plaintiffs, HomeSide can, at most, be accused of aiding and abetting and cannot be liable under § 10(b) or any subpart of Rule 10b-5.

Accord Wright, 152 F.3d at 175; *Fidel v. Farley*, 392 F.3d 220, 235 (6th Cir. 2004); *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1204-06 (11th Cir. 2001); *Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225-27 (10th Cir. 1996), *In re Software Toolworks Inc. Sec. Litig.*, 50 F.3d 615, 628 n.3 (9th Cir. 1994).

CONCLUSION

For the reasons set forth above, Washington Mutual Bank, F.A., as successor in interest to HomeSide Lending, Inc. respectfully submits that the decision and order of the District Court should be affirmed and the case dismissed.

Dated: July 2, 2007

Respectfully submitted,

FRIEDMAN KAPLAN SEILER & ADELMAN LLP

/s/ Eric Seiler
Eric Seiler
1633 Broadway
New York, NY 10019-6708
(212) 833-1100

Attorneys for Appellee Washington Mutual Bank, F.A., as successor in interest to HomeSide Lending, Inc.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4,694 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Times New Roman 14-point font.

July 2, 2007

FRIEDMAN KAPLAN SEILER &
ADELMAN LLP

/s/ Eric Seiler

Eric Seiler
1633 Broadway
New York, NY 10019-6708
(212) 833-1100

Attorneys for Defendant-Appellee
Washington Mutual Bank, F.A.,
as successor in interest to
HomeSide Lending, Inc.

ANTI-VIRUS CERTIFICATION

Case Name: Morrison v. National Australia

Docket Number: 07-0583-cv

I, Raceel Pascall, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 7/2/2007) and found to be VIRUS FREE.

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Raceel Pascall
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Dated: July 2, 2007